CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

March 31, 2014

Via FCC Electronic Comment Filing System and Electronic Mail

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

CC: fcc@bcpiweb.com

Re: Report on FCC Process Reform, GN Docket No. 14-25

Dear Secretary Dortch:

The Center for Competitive Politics ("CCP") respectfully submits these comments on the February 14, 2014 Report on FCC Process Reform ("Report"). CCP commends the FCC for its continued effort to operate in an efficient and effective manner.

CCP writes, however, to express concern about Report Recommendation 5.44, "Transparency as to Real Party in Interest," which recommends that "the Commission adopt rules as proposed in the 2011 FNPRM." That document stated that "although some interested parties may be knowledgeable about the identities of the 'parties behind the parties' supporting or opposing their positions [in docketed proceedings], other parties and the general public may not be equally knowledgeable," and concluded that "it would serve the public interest to have a disclosure requirement that addresses this problem."

CCP is a § 501(c)(3) organization dedicated to protecting the First Amendment rights to freedom of speech, association, and petition. FCC action of the kind suggested by the 2011 FNPRM, and revisited in the Report, would squarely implicate those freedoms. Moreover, an FCC attempt to promulgate rules requiring disclosure of anyone who might have an "interest" in a particular public comment will present significant practical difficulties.

Because these constitutional and practical concerns may not be readily apparent to regulators unaccustomed to acting in areas affecting core First Amendment activity, CCP takes this opportunity to strongly urge the FCC not to take action likely to chill political expression and the ability of groups and individuals to offer their views to the Commission. Indeed, these comments themselves illustrate the difficulties engendered by a "real party in interest" rule.

I. Requiring disclosure as a precondition of commenting on FCC proceedings would violate clear statutory authority, Congressional intent, and principles of constitutional law.

a. Congress has established special tax status for organizations that speak out on public issues—including many of the organizations that comment on FCC proceedings—and specifically exempts contributors to these organizations from public disclosure.

Recommendation 5.44 offers the following cautionary example to justify compelled disclosure of "real parties in interest:" "an organization purporting to represent consumer interests may actually represent industry, or may be influenced by industry contributions." Such reasoning, however, suggests that the FCC would evaluate a comment based upon the speaker, rather than the merits and substance of the arguments presented. Adopting such a policy surely would hinder the Commission's goal of furthering transparency and increasing public confidence in agency action.

Furthermore, legally speaking, this focus on contributions is misguided, and would likely render any resulting "party in interest" disclosure rule unconstitutional. This is in part because many groups and associations—often those with special tax status under Federal law, such as § 501(c)(3) educational organizations, § 501(c)(4) social welfare organizations, § 501(c)(5) labor and agricultural organizations, § 501(c)(6) business leagues, and related groups—participate in public education, debate, and advocacy by filing comments on administrative actions.

The special tax status Congress created with the Internal Revenue Code is based upon these groups' important role in civil society. § 501(c)(4) social welfare organizations, for example, maintain their tax status so long as they are "primarily engaged in promoting in some way the common good and general welfare of the people of the community."[1] To this end, they are allowed to engage in *unlimited* lobbying activities. Indeed, some of the most respected § 501(c)(4) organizations advocate for the homeless, the environment, civil liberties, economic freedom, fiscal responsibility, efficient government, gun rights, gun control, and historic preservation—to name just a few causes relating to social welfare. Certainly, federal communications policy, with its broad implications for both industry and ordinary citizens, also belongs on this list.

Recognizing the importance of such advocacy organizations—and the right of their donors to associate with like-minded individuals and avoid public condemnation for the causes they support—Congress deliberately made donors to § 501(c)(4) organizations confidential.[2]

Similarly, § 501(c)(3) organizations, like CCP, often comment on proposed regulatory or enforcement actions.[3] And donors to § 501(c)(3) organizations are also shielded from disclosure.

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[1] 26 C.F.R. § 1.501(c)(4)-1(a)(2).

[2] 26 USC 6104(d)(3)(A) ("In the case of an organization which is not a private foundation (within the meaning of section 509(a) [26 USCS § 509(a)]) or a political organization exempt from taxation under section 527 [26 USCS § 527], paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization.")

The important role of these educational organizations in civil society would be burdened by an FCC rule requiring disclosure of donors as a precondition to commenting on agency action. This letter, for example, would likely trigger such requirements, rendering it difficult for CCP to further its mission of educating the public about the effects of money in politics and the benefits of increased freedom and competition in the electoral process. The same is true for § 501(c)(5) and § 501(c)(6) organizations.

b. The United States Supreme Court has further recognized the constitutional problems with compelled disclosure of contributor information in the context of nonprofit speech and other advocacy.

The United States Supreme Court, too, has emphasized the importance of donor privacy in a line of cases dating back to the civil rights era.

In *NAACP v. Alabama ex rel. Patterson*,[4] for example, the state sought donor lists from the NAACP, a nonprofit dedicated to advancing the welfare of African-Americans. The Supreme Court concluded that disclosure of these lists would unconstitutionally abridge the associational rights of the NAACP's members, concluding that "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order" as a "requirement that adherents of particular...political parties wear identifying arm-bands."[5] Thus, it squarely rejected Alabama's attempt to obtain NAACP contributor information under the guise of state authority.

The seminal campaign finance case of *Buckley v. Valeo*[6] provides a similar example. There, in the context of campaign finance laws burdening political speech and association, the Court reiterated that "[t]he constitutional right of association...stem[s] from the...recognition that '[e]ffective advocacy of both public and private points of view...is undeniably enhanced by group association.'"[7] Acting to safeguard this liberty, the Court explicitly noted that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."[8] The Court was further concerned by "the invasion of privacy of belief" generated by disclosure, given that "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs."[9] Thus, it required that laws burdening political speech must be justified by a sufficiently important governmental interest.

In this case, there is certainly no sufficiently important governmental interest justifying a disclosure requirement conditioning the opportunity to comment on FCC activity. Moreover,

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[3] CCP, for its part, submitted three separate comments on a recent IRS Notice of Proposed Rulemaking. *See* Bradley A. Smith and Allen Dickerson, Center for Competitive Politics, Comment on IRS NPRM, REG-134417-13 (Dec. 5, 2013); Eric Wang, Center for Competitive Politics, Supplemental Comments on IRS NPRM, REG-134417-13 (Jan. 23, 2014); Bradley A. Smith and Allen Dickerson, Center for Competitive Politics, Supplemental Comments on IRS NPRM, REG-134417-13 (Feb. 21, 2014).

[4] 357 U.S. 449 (1958). *See also Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963).

[5] *Id.* at 462.

[6] 424 U.S. 1 (1976).

[7] *Id.* at 15 (quoting *NAACP v. Alabama*, 357 U.S. at 460).

[8] *Buckley*, 424 U.S. at 66.

[9] *Id.* (quotation and citation omitted).

Congress has *explicitly foreclosed* such disclosure under the Internal Revenue Code, at least for certain categories of speakers. Thus, in attempting to regulate this important charitable speech and association, the FCC would potentially stumble over difficult constitutional terrain, and may find itself involved in costly and distracting litigation.

II. "True party in interest" is an impermissibly vague term.

Compounding the constitutional problems with a "real party in interest" disclosure rule is the vague and undefined nature of that term under the FCC's current regulatory paradigm. Indeed, neither the Report nor the 2011 FNPRM it relies upon explores what a "real party in interest" is for purposes of an FCC comment. Without knowing what makes someone a "real party in interest" for purposes of an FCC proceeding, it is impossible to draft a requirement that such entities be disclosed. Indeed, comments on the 2011 FNPRM reflected similar concerns about this imprecision, noting the difficulty of requiring disclosure under such an amorphous standard, and the lack of evidence to justify a broad-based disclosure requirement.[10]

Vague terms not only present drafting challenges, they also further exacerbate constitutional weaknesses. Indeed, in the context of the rights to associate and petition the government—both of which are implicit in the decision to comment upon FCC proceedings—the United States Supreme Court has held that "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."[11] This is because "standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[12] In this vein, a law is unconstitutionally vague when it subjects the exercise of a right to "an unascertainable standard,"[13] meaning that "'men of common intelligence must necessarily guess at its meaning.'"[14]

Here, the vague nature of the term "real party in interest" would likely render a regulation that conditions the right to speak on such disclosure unconstitutional. Regulation must err on the side of avoiding chill, providing objective rules that can be uniformly applied, and providing clarity in a manner that maximizes the free exchange of ideas guaranteed by the First Amendment. As Chief Justice Roberts has noted, in close cases "the tie goes to the speaker, not the censor."[15]

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[10] In the matter of Amendment of the FCC's *Ex Parte* Rules and Other Procedural Rules, GC Docket No. 10-43, Report and Order and Further Notice of Proposed Rulemaking, para. 79, available at http://www.dwt.com/files/uploads/documents/Advisories/02-11_Fedeli_FCCadvisory.pdf (Adopted Feb. 1 2011) ("NTCA comments that requiring a comparable level of disclosure from different types of participating entities would be difficult to implement. NTCA also recommends that we not adopt any disclosure requirement until we define the specific instances in which lack of disclosure historically has been a problem.")

[11] *NAACP v. Button*, 371 U.S. 415, 438 (1963).

[12] *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603-604 (1967) (quoting *NAACP v. Button*, 371 U.S. at 432-33).

[13] *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971).

[14] *Id.* (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

[15] *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (Roberts, C.J., concurring).

III. Requiring disclosure of amorphous "real parties in interest" before allowing comments on FCC proceedings will chill the right to petition a governmental agency, and likely lessen the amount of useful information the FCC receives from outside sources.

The speech-chilling effect of a potential "real party in interest" disclosure rule would not only present constitutional problems, it would also directly harm the FCC and its mission, and undermine the goal of furthering efficiency and transparency. Indeed, increasing the burden upon would-be commenters will inevitably lead to fewer perspectives and ideas being brought to the Commission's attention. This is especially so in the case of groups like CCP that are not "industry insiders" or other entities routinely engaged with the FCC's work.

Finally, regulations that make it more difficult for the public to comment upon agency actions raise serious administrative law objections. The requirement that agencies give public notice and allow for public comment concerning their activities is a significant check on the authority Congress has delegated to the independent agencies. To the extent the FCC is considering a rule that would burden the public's ability to comment upon its actions, it will expose itself to accusations that it seeks to insulate its official activity, possibly in derogation of its obligations under the Administrative Procedure Act.

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For these reasons, CCP urges the Commission to forego adopting a rule pursuant to Recommendation 5.44.

Thank you for the opportunity to comment, and for your attention to this matter.

Respectfully submitted,

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Legal Director

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